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NO. 84-1769

IN THE

Supreme Court Of The United States

October Term, 1984

LIDA K. MAYFIELD,
Petitioner,

vs.

AUBURN UNIVERSITY, BOARD OF TRUSTEES OF AUBURN UNIVERSITY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Should certiorari be granted to review a judgment of a court of appeals which, after full briefing and oral argument, affirmed a judgment of a district court which the appellate court determined was based on findings of fact that were not clearly erroneous and in which no error of law appeared, and then denied rehearing and suggestion for rehearing en banc; the trial court having determined that petitioner, a faculty member, who had not been granted tenure at Auburn University which had and followed a formal tenure process, and who had appealed to the President of the University and was denied tenure, had suffered no deprivation of any constitutional right?

2. Should certiorari be granted to review a judgment of a court of appeals, which affirmed the district court judgment holding that Auburn University had "an explicit procedure for conferring tenure at all times," and that the tenure process, with appeal to and determination by the President of the University, did not violate any constitutional right of Petitioner?

3. Should certiorari be granted to review a judgment of a court of appeals, which is consistent with decisions of other federal appellate courts and is not in conflict with applicable decisions of this Court?

4. Should certiorari be granted to review a judgment of a court of appeals which affirmed the judgment of a district court which is not clearly erroneous in fact or contrary to law?

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The opinions and judgments of the courts below are set forth in the Appendix to the Petition.

JURISDICTION

Jurisdiction is based upon 28 U.S.C. § 1254(1). Respondents submit, however, that this is not a proper case meriting review on writ of certiorari.

STATEMENT OF THE CASE

The statement of the case by Petitioner is incomplete and respondents refer to the District Court's opinion, which appears as Appendix "C" (A5) to the Petition.[1] Petitioner's statement of "relevant evidentiary facts" is incomplete, and in part inaccurate, and Respondents refer to the District Court's opinion and further point out:

Petitioner does not state the fact that when the eligible members of the music faculty voted as to whether petitioner should be considered for tenure, there were seven negative votes, five positive votes, and two abstentions. When she was placed in the tenure process before the tenure and promotion committee, of the fourteen members of the music department faculty, eleven recommended against and three recommended for the granting of tenure. The Dean and the Head of the Department also added their recommendations against the award of tenure.

Petitioner does not state that the evidence clearly shows that she was familiar with the tenure process and that she knew that the recommendations of her peers, her fellow faculty members, were important to the granting or denial of tenure. The quotation from the Faculty Handbook (Petition, p. 10), is incomplete and fails to quote the following part of the provisions:

> "Faculty and department heads should remember that decisions on tenure are different in kind from those on promotion. Although the nominee's teaching, service, and scholarly credentials are important elements in the nomination, recommendations should also be based on factors that are directly related to the prospect of the nominee's

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[1]The District Court's opinion as reproduced at Petitioner's Appendix "C" omits a portion of the text at Appendix A33. Following the word "corrected" on the second to last line, the following appears in the opinion: ". . . . .before utilizing the information from the cards. He explained that the errors were situations where the cards had been punched between the numbers, as where a punch should have been on the number 3 but it appeared between the numbers 3 and 4. He assured the Court nonspecifically that these errors had been corrected. . . . ."

> assuming what may well be an appointment of ten, twenty or thirty years in the department unit: Are the nominee's abilities compatible with the departmental mission and with its long-term goals? Is the nominee compatible with colleagues? Has the nominee exhibited an ability and willingness to engage in shared tasks that a departmental group must often perform and to participate with some measure of reason in discussions germane to departmental policies and programs?"

The statement on Page 11 of the Petition that the Tenure and Promotions Committee made the decision "without having heard at all from Mrs. Mayfield," and that she didn't know when she had been placed "up for tenure consideration" is inaccurate. The fact is that Mrs. Mayfield submitted ninety-three pages of material for consideration by the Committee, which was considered and reviewed by all the Committee before it determined that "she not be recommended for tenure," and transmitted its recommendation to the President of the University. The President accepted the recommendation and Mrs. Mayfield was notified. Dr. Littleton, the Chairman of the Tenure and Promotions Committee, met with Mrs. Mayfield and agreed to, and did, synthesize the reasons for the negative recommendations and furnished it to her and fully cooperated with her to provide her assistance with an appeal. Mrs. Mayfield exercised her right of appeal, as provided by the Faculty Handbook, to the President of the University, and submitted with her appeal extensive comments, observations and documents. Petitioner incorrectly asserts as a fact (Petition, p. 12) that "instead of deciding her appeal, he sent it back to the Tenure and Promotion Committee."

The fact is that Dr. Funderburk, the President, reviewed the appeal and the substantial amount of material submitted by Mrs. Mayfield, including "biographical material, resume, letters, things of that nature." Dr. Funderburk, called as a witness by petitioner, testified: "Q. Did you, yourself, review that material - - - - ? A. Yes."

Dr. Funderburk reviewed the appeal and all matters sub-

mitted, and denied the appeal, and notified Mrs. Mayfield accordingly on July 13, 1981:

> "I regret to inform you that the appeal of the original negative decision on your tenure has been denied. This decision was reached following a thorough review of your appeal and also after securing an additional advisory opinion from the Committee on Tenure and Promotion. The contents of the appeal did not contain evidence sufficiently persuasive to change the earlier decision. Again, I regret having to communicate this to you." (DX 16, last numbered page). (RV1, p. 77).

Following this, in accordance with university policy and procedure, Mrs. Mayfield was notified that her yearly contract would not be renewed at the end of the next academic year.

At the trial in District Court, all members of the Music Department faculty were tendered for testimony and cross-examination. The Court found (Petition, Appendix C at p. A17):

> "The testimony of the tenured faculty in the Music Department showed overwhelmingly that, while Plaintiff participated in group music educational programs on many occasions, she refused on many occasions to inconvenience herself, that she was publicly and unnecessarily critical of fellow faculty members in a way so as to weaken the program, and that she was extremely harsh in her criticism of some of her students. Elements to be considered in tenure decisions are, among others, (1) compatibility with colleagues, (2) compatibility with departmental mission and goals, and (3) ability and willingness to engage in shared tasks that a departmental group must often perform (Defendants' Exhibit 32, p. 23)."

The district court found the facts in favor of the Respondents, found that petitioner's claims were without merit, and entered judgment accordingly. The Court of Appeals, having the massive record before it, and after full briefing and oral argument, affirmed the lower court's judgment without opinion under 11th Circuit Rule 25, which provides:

> "When the court determines that any of the following circumstances exist:

"(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

* * * * *

"and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion."

Petition for Rehearing and Suggestion for Rehearing en banc were denied.

REASONS WHY PETITION SHOULD NOT BE GRANTED

There are no special or important reasons for granting a writ of certiorari. The decision below does not conflict with decisions of other federal courts, and does not conflict with applicable decisions of this court. As to the facts, the court below correctly applied the standards of Rule 52(a) F.R.C.P. in determining that the findings of fact were not erroneous.

Auburn University has an explicit tenure program and procedure which the court found was followed in this case. The court's decision is clear that Petitioner was given every opportunity to prove her claims and failed to do so.

The court's decision is consistent with the decisions of this court in *Perry v. Sinderman,* 408 U.S. 593 (1972) and *Board of Regents v. Roth,* 408 U.S. 564 (1972).

Federal courts of appeal have rejected the notion that de facto tenure can be achieved where there exists an established tenure system. For example, *Haimowitz v. University of Nevada,* 579 F.2d 526, at p. 528 (8th Cir. 1978), passed upon a case where a faculty member was at all times fully aware of his status as an employee who could achieve tenure only in accordance with the published formal tenure regulations, stating at p. 528:

"The entire thrust of formal tenure provisions is to standardize the process of faculty selection and employment security. In other words, formal tenure regulations

are designed to avoid the *de facto* tenure problem recognized in *Perry*."

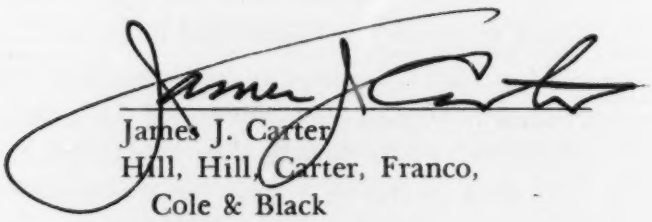
Other cases cited by the district court include: *McElearney v. University of Illinois, etc.,* 612 F.2d 285, at p. 291 (7th Cir. 1979); *Beitzell v. Jeffrey,* 643 F.2d 870, at pp. 874-875 (1st Cir. 1981); *Plummer v. Board of Regents,* 552 F.2d 716 (6th Cir. 1977); *Bertot v. School District No. 1,* 522 F.2d 1171 (10th Cir. 1975); *Cusumano v. Ratchford,* 507 F.2d 980 (8th Cir. 1974); cf *Willens v. University of Massachusetts,* 570 F.2d 403 (1st Cir. 1978).

Within the established Considerations Governing Review on Writ of Certiorari, U.S. Supreme Court Rule 17, there are no special or important reasons for granting a writ of certiorari in this case.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James J. Carter, one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of The United States, hereby certify that on the 27 day of May 1985, I served the foregoing Brief of Respondents in Opposition to the Petition for a Writ of Certiorari upon the Petitioner by mailing three copies thereof by United States Mail, first class postage prepaid, and addressed to the attorney for Petitioner, as follows:

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